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Supreme Court, U.S.
FILED
MAR 14 1995
OFFICE OF THE CLERK

No. 94-878

In the Supreme Court of the United States

OCTOBER TERM, 1994

GREGORIO IGARTUA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Whether United States citizens residing in the Commonwealth of Puerto Rico are constitutionally entitled to vote for electors for President and Vice President of the United States.

2. Whether the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff *et seq.*, is unconstitutional for failing to provide that American citizens who move to Puerto Rico retain the federal voting rights they possessed in their prior State of residence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 32 F.3d 8. The opinion of the district court (Pet. App. 7-17) is reported at 842 F. Supp. 607.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1994. The petition for a writ of certiorari was filed on November 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, twelve United States citizens residing in Puerto Rico, filed suit in the United States District Court for the District of Puerto Rico, alleging that their

inability to vote for President and Vice President of the United States violated their constitutional rights. Petitioners also challenged the constitutionality of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973ff to 1973ff-6 (Overseas Voting Act), because the Act provides for absentee voting in presidential elections for United States citizens who move overseas, but not for those who move from one of the fifty States to Puerto Rico. Petitioners sought declaratory and injunctive relief.

The district court dismissed petitioners' complaint for failure to state a claim upon which relief could be granted. Pet. App. 8. The court found that Article II of the United States Constitution expressly provides that the "States," not individual citizens, may choose electors for President and Vice President. *Ibid.* Because Puerto Rico is neither a State nor the subject of a constitutional amendment like the Twenty-Third, which extended voting rights in presidential elections to the District of Columbia, the court held that U.S. citizens residing in Puerto Rico have no right to vote in presidential elections. Pet. App. 9.

The district court rejected petitioners' contention that Puerto Rico has attained the status of a "de facto" State entitled to electoral votes. Pet. App. 9-12. The court concluded that Article IV of the Constitution specifically commits to Congress the decision to create new States, and concluded further that no judicially manageable standards exist for determining whether Puerto Rico should be considered a "de facto" State for purposes of voting in presidential elections. Pet. App. 11-12. Accordingly, the district court held that the issue presented a nonjusticiable political question. *Id.* at 12.

Finally, the district court held that the Overseas Voting Act does not unconstitutionally discriminate

between state residents who move overseas and those who move to Puerto Rico. Pet. App. 14-16. The Act permits persons living abroad to vote by absentee ballot in their last place of residence in the United States (including Puerto Rico) so long as they had been qualified to vote in that place immediately before moving abroad. See *id.* at 13. The Act, however, does not apply to persons who move to Puerto Rico or other U.S. territories. The court found that the Act's distinction between persons moving abroad and those moving within the United States was "rational and nondiscriminatory," since individuals who move to a new place within the United States gain voting rights in their new residence, while individuals who move abroad do not acquire federal voting rights in the country to which they move. *Id.* at 16. Because it found that the Act bears a reasonable relation to a proper legislative purpose, the court rejected petitioners' due process and equal protection claims. *Ibid.*

2. The court of appeals affirmed in a per curiam opinion. Pet. App. 1-5. The court held that, under Article II, the right to vote for presidential electors inheres in States rather than in individual citizens. Pet. App. 2. Since Puerto Rico is not a State, and since no constitutional amendment accords Puerto Rico presidential voting rights like those given the District of Columbia by the Twenty-Third Amendment, the court found no basis for petitioners' constitutional claims. Pet. App. 2-3.

The court of appeals also rejected petitioners' challenge to the Overseas Voting Act. Pet. App. 4-5. The court found that the Act's distinction between citizens who move overseas and those who move within the United States neither imposes a suspect classification nor infringes a fundamental right, and therefore

need only be justified by a rational legislative basis. *Ibid.* That rational basis was established by Congress's limited goal of protecting the federal voting rights of persons who move abroad and gain no new federal voting rights in their overseas residence. *Id.* at 5. The court concluded that the effect of a move to Puerto Rico upon an individual's ability to vote in presidential elections is a consequence of the Constitution rather than of the Overseas Voting Act. *Ibid.*

The court of appeals also rejected, in a footnote, the argument raised for the first time on appeal that petitioners are guaranteed presidential voting rights by a provision of the International Covenant on Civil and Political Rights, entered into force Sept. 8, 1992, art. 25, 6 I.L.M. 375 (1967), a multilateral treaty to which the United States is a signatory. Pet. App. 3 n.1. The court found that, even if the Covenant provision could be read to imply such a right, the treaty could not give rise to privately enforceable rights in the United States because the provision is not self-executing, and because, in any case, the terms of the Covenant cannot override the constitutional limits of Article II. Pet. App. 3 n.1.

ARGUMENT

1. a. United States citizens residing in Puerto Rico have no constitutional right to vote in presidential elections because the Constitution assigns to the "States"—and by express constitutional amendment, to the District of Columbia—the right to choose electors for President and Vice President. Article II provides that "[e]ach *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress." U.S. Const. Art. II, § 1, Cl. 2 (emphasis

added). Similarly, the Twelfth Amendment provides that the electors "shall meet in their respective *states* and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same *state* with themselves." U.S. Const. Amend. XII (emphasis added).

The import of these constitutional provisions is clear: Jurisdictions that are part of the United States but are not "States" and do not send Senators and Representatives to Congress, are not empowered to choose electors for President and Vice President.[1] See *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 n.18 (1983) ("the Constitution expressly delegates authority to the *States* to regulate the selection of Presidential electors") (emphasis added); *Buckley* v. *Valeo*, 424 U.S. 1, 106 (1976) (per curiam) ("a President is elected not by popular vote, but by winning the popular vote in enough *States* to have a majority in the Electoral College) (emphasis added).

Accordingly, a constitutional amendment was required to authorize citizens of the District of Columbia to choose electors for President and Vice President. U.S. Const. Amend. XXIII (District shall appoint "[a] number of electors * * * equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State"). As Congress recognized at the time of its passage, such an amendment was necessary because "the Constitution provides

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[1] By Act of Congress, Puerto Rico is entitled to send a Resident Commissioner to the House of Representatives. Act of Apr. 12, 1900, ch. 191, § 39, 31 Stat. 86. The voting rights of the Resident Commissioner are prescribed by rules of the House of Representatives, subject to constitutional limitations. See generally *Michel* v. *Anderson*, 14 F.3d 623 (D.C. Cir. 1994).

machinery only through the *States* for the selection of the President and the Vice President (art. II, sec. 1)." H.R. Rep. No. 1698, 86th Cong., 2d Sess. 2 (1960) (emphasis added); see also *ibid.* (D.C. residents "cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States").

The First Circuit's decision in this case comports with the views of the only other circuit to address a similar claim. In *Attorney General of Guam* v. *United States*, 738 F.2d 1017 (1984), cert. denied, 469 U.S. 1209 (1985), the Ninth Circuit rejected a suit seeking presidential voting rights brought on behalf of U.S. citizens residing in Guam. That court explained: "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors. Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation." 738 F.2d at 1019. See also *Sanchez* v. *United States*, 376 F. Supp. 239, 241 (D.P.R. 1974) (finding identical claim by Puerto Rican residents "plainly without merit" for purposes of convening three-judge court).

Similarly, whatever its powers of local self-government, "the status of the Commonwealth of Puerto Rico is still not the same as that of a State in the Federal Union." *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992) (quoting Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 19 (1953)). Cf. *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam) ("Congress * * * may treat Puerto Rico differently from States so long as there is a rational basis for its actions."); *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 596

(1976) (Puerto Rico occupies a unique relationship to the United States). Because Puerto Rico is not a State, U.S. citizens residing in Puerto Rico have no constitutional right to vote in presidential elections.[2] The fact that Puerto Rico may be "like a state" (see Pet. 5) in various respects does not confer rights explicitly withheld by the Constitution.

b. The court of appeals correctly rejected petitioners' argument, raised for the first time on appeal, that their inability to vote in presidential elections violates Article 25 of the International Covenant on Civil and Political Rights (Covenant), a multilateral treaty to which the United States is a party. See 6 I.L.M. 375 (entered into force Sept. 8, 1992). In its resolution of ratification, the Senate "declare[d] that the provisions of Articles 1 through 27 of the Covenant are not self-executing," 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992),[3] a fact peti-

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[2] Petitioners rely heavily on this Court's statement in *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 8 (1982), that "the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States." See, *e.g.*, Pet. 11, 18, 19. The quoted language, however, refers to the rights of *individual citizens*, while the Constitution reserves to the *States*, not to citizens, the right to vote for President by presidential electors. See U.S. Const. Art. II, § 1, Cl. 2; *Buckley* v. *Valeo*, 424 U.S. at 106. Petitioners also rely (*e.g.*, Pet. 9, 11) on *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 600 (1976), which recognized that due process and equal protection guarantees extend to residents of Puerto Rico. The protections in the Fifth Amendment, however, do not invalidate the express terms of Article II.

[3] In doing so, the Senate adopted a proposal made by the President. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 19 (1992); see also Restatement (Third) of Foreign Relations of the United States § 111, cmt. h (1987) ("the intention of the United States determines whether an agreement is to be self-executing in

tioners apparently concede (Pet. 20). The Covenant therefore does not give rise to privately enforceable rights under U.S. domestic law. See *United States* v. *Thompson*, 928 F.2d 1060, 1066 (11th Cir.) ("a treaty must be self-executing in order for an individual citizen to have standing to protest [its] violation"), cert. denied, 502 U.S. 897 (1991); see also *United States* v. *Green*, 671 F.2d 46, 50 (1st Cir.), cert. denied, 457 U.S. 1135 (1982); Restatement (Third) of Foreign Relations of the United States § 111, cmt. h (1987).[4]

Moreover, even were the treaty self-executing, the Covenant could not override specific limitations contained in the Constitution. See, *e.g.*, *Reid* v. *Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion). In addition, the Senate expressly conditioned its ratification of the Covenant on the proviso that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992).

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the United States or should await implementation by legislation or appropriate executive or administrative action. * * * [O]ften the President must decide in the first instance whether the agreement is self-executing.").

[4] Article 25 of the Covenant provides, in pertinent part:

> [e]very citizen shall have the right and the opportunity, without * * * unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote * * * at genuine periodic elections which shall be by universal and equal suffrage * * *, guaranteeing the free expression of the will of the electors.

6 I.L.M. at 375. It is not clear that there is any conflict between these general provisions and the inability of Puerto Ricans to vote for electors for President.

2. Several of the petitioners moved to Puerto Rico from a State. These petitioners argue that the Overseas Voting Act unconstitutionally discriminates against them because it authorizes absentee voting in presidential elections by residents of States who move to foreign countries, but not by those who move to Puerto Rico. Pet. 21-28.

The Overseas Voting Act provides that U.S. citizens residing outside the United States who are otherwise qualified to vote in their last State of residence, or who were so qualified at the time they left that State, may cast absentee ballots in federal elections in that State. 42 U.S.C. 1973ff-1, 1973ff-5. The Overseas Voting Act does not apply, however, to people who move from one place to another within the United States, including those who move from a State to Puerto Rico. 42 U.S.C. 1973ff-6(5), 1973ff-6(8) (defining "overseas voter" to mean a person "who resides outside the United States," and defining "United States" to include Puerto Rico).

The court of appeals concluded that the Act does not violate equal protection or due process principles. It held that the distinction drawn in the Act between U.S. citizens who move overseas and those who move to another part of the United States "neither affects a suspect class nor infringes a fundamental right" (Pet. App. 4); thus, the classification need only bear a rational relationship to a legitimate governmental objective. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (equal protection); *Reno* v. *Flores*, 113 S. Ct. 1439, 1448-1449 (1993) (substantive due process).

Petitioners contend that Congress's extension of absentee voting rights did not reach far enough, and that petitioners who have moved to Puerto Rico from a State should, like "overseas" voters, be authorized to file state absentee ballots in presidential elections. Pet. 24-28.

This Court has held that claims of that nature are subject to rational basis review. In *Katzenbach* v. *Morgan*, 384 U.S. 641, 656-658 (1966), the Court considered a challenge to the constitutionality of Section 4(e) of the Voting Rights Act, 42 U.S.C. 1973b. Section 4(e) barred States from applying English literacy requirements to voters who had been educated through the sixth grade in American-flag schools in which the predominant classroom language was other than English. See 384 U.S. at 643 n.1. The *Katzenbach* petitioners argued that Section 4(e) discriminated against voters educated in a language other than English in *non*-American-flag schools, *i.e.*, "that Congress violated the Constitution by not extending the relief effected in § 4(e) to those educated" outside U.S. territory. 384 U.S. at 656-657. This Court held that

> [i]n deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights * * * is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise. Rather, in deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principle[] that a "statute is not invalid under the Constitution because it might have gone farther than it did."

Id. at 657. The Court, finding various legitimate grounds that "might well have been the basis for the decision of Congress to go 'no farther than it did,'" sustained Section 4(e) against petitioners' equal protection

challenge. 384 U.S. at 658.[5] See also *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 471 n.33 (1977) ("mere underinclusiveness is not fatal to the validity of a law under the equal protection component of the Fifth Amendment").

The rationale of *Katzenbach* applies in this case, and the Overseas Voting Act satisfies rational basis review. In enacting the Act (and its predecessor legislation), Congress sought to extend and protect absentee voting rights in federal elections.[6] See H.R. Rep. No. 765, 99th Cong., 2d Sess. 5 (1986) ("The primary purpose of [the Overseas Voting Act] is to facilitate absentee voting by United States citizens, both military and civilian, who are overseas."); *id.* at 6 (absentee ballots may be used "by overseas voters who would otherwise be disenfranchised"). The Act does not restrict or deny voting

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[5] See also *Buckley* v. *Valeo*, 424 U.S. at 105 (federal campaign-finance law not unconstitutional for failing to provide funds for candidates not running in party primaries; Congress may choose "to limit * * * the reach of the reforms"); *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 37-39 (1973) (applying rational basis review and upholding Texas school-financing scheme alleged to discriminate against students from poorer neighborhoods, where entire scheme was aimed at extending and improving public education).

[6] The substantive provisions of the Overseas Voting Act that are challenged in this case were originally enacted as part of the Overseas Citizens Voting Rights Act of 1975 (1975 Act), Pub. L. No. 94-203, 89 Stat. 1142, codified at 42 U.S.C. 1973dd to 1973dd-6. The current legislation made only minor substantive changes in preexisting law, and was intended primarily to consolidate and update the provisions of the 1975 Act and a second statute—the Federal Voting Assistance Act of 1955—that also dealt with absentee voting. H.R. Rep. No. 765, 99th Cong., 2d Sess. 6 (1986). Accordingly, much of the relevant legislative history is found in the history of the 1975 Act.

rights to any class of persons; it is, rather, "a reform measure aimed at eliminating an existing barrier to the exercise of the franchise," *Katzenbach*, 384 U.S. at 657, by providing for absentee voting in enumerated circumstances.

Congress was concerned that "most American citizens residing outside the United States, who are in the private sector, continue to be *excluded* from the democratic process of their own country." S. Rep. No. 120, 94th Cong., 1st Sess. 4 (1975) (emphasis added); H.R. Rep. No. 649, 94th Cong., 1st Sess. 4 (1975) (emphasis added).[7] In extending absentee voting protections, it was rational for Congress to distinguish between U.S. citizens who move to a different jurisdiction within the United States, and thereby acquire new federal voting rights and avenues for participation in the federal political process, and citizens who move overseas, and thereby acquire no new United States voting rights or means of participating in U.S. national politics.[8] In

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[7] Congress found in 1975 that only about 25% of the more than 750,000 voting-age private citizens living abroad cast a ballot in the 1972 general election. S. Rep. No. 121, 94th Cong., 1st Sess. 2, 6 (1975); H.R. Rep. No. 649, 94th Cong., 1st Sess. 2, 6 (1975). Because these persons were "subject to U.S. tax laws and other obligations of American citizenship," Congress believed that the restrictive absentee voting requirements of many States unfairly discriminated against those citizens. S. Rep. No. 121, *supra*, at 2, 3; H.R. Rep. No. 649, *supra*, at 2, 3.

[8] It is not uncommon for federal legislation to distinguish, explicitly or implicitly, between acts and events that occur within the United States and those that occur in foreign territory. See, *e.g.*, 28 U.S.C. 2680(k) (Federal Tort Claims Act's waiver of sovereign immunity does not apply to "[a]ny claim arising in a foreign country"). Indeed, this Court has long applied a "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the

contrast to the state resident who moves to a foreign country, the state resident who moves to Puerto Rico gains the right, *inter alia*, to vote for a federal officer (Puerto Rico's Resident Commissioner to Congress) and to participate in the presidential nominating process. See U.S. General Accounting Office, *U.S. Insular Areas: Applicability of Relevant Provisions of the U.S. Constitution* 7 (1991).

Moreover, if Congress had extended absentee voting rights to citizens who relocate to Puerto Rico, some Puerto Rican residents would be able to vote in presidential elections while their otherwise similarly-situated Puerto Rican neighbors could not. In contrast, Congress's grant of absentee voting rights to overseas citizens does not create any disuniformity of rights within that class of persons.[9] Congress could reasonably have concluded that extending federal absentee voting rights to persons who move to Puerto Rico—and thereby

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territorial jurisdiction of the United States." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949) (holding that eight-hour labor law applies only to contracts performed within United States territory); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (applying canon to Title VII of 1964 Civil Rights Act). In this case, Congress had particular reasons to be concerned with the rights of citizens who move outside the United States and, therefore, to create a classification that applies *only* extra-territorially.

[9] To the contrary, Congress's initial extension of absentee voting rights to overseas citizens in the 1975 Act sought to remedy what it perceived to be state "discrimination in favor of [overseas] Government personnel and against [overseas] private citizens." S. Rep. No. 121, *supra*, at 3; H.R. Rep. No. 649, *supra*, at 3. That is, Congress had found that most States permitted military personnel and other federal employees living overseas to cast absentee ballots, while private citizens often could not. S. Rep. No. 121, *supra*, at 3; H.R. Rep. No. 649, *supra*, at 3.

become subject, like other Puerto Rican residents, to the benefits and burdens of such residence—would not only create a questionable end-run around the strictures of the Constitution, but would work a discrimination against native-born Puerto Ricans.

It also is important to recognize that "[n]othing in th[e] Act" "prevent[s] any State from adopting any voting practice which is less restrictive than the practices prescribed by th[e] Act." H.R. Rep. No. 765, *supra*, at 19. Although Congress has chosen to expand the absentee voting rights of only one class of persons, the States remain free to extend such rights to other classes, including petitioners.

In assuring absentee voting rights only to citizens who move overseas, Congress chose to provide a limited remedy to a problem of disenfranchisement. Under settled principles of this Court's jurisprudence, "the limitation of relief effected in [the Overseas Voting Act] does not constitute a forbidden discrimination" because rational and legitimate factors support the "decision of Congress to go 'no farther than it did.'" *Katzenbach*, 384 U.S. at 658.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1995